

All contractors face professional liability exposure due to the services they provide. For some, professional services may include actual engineering, inherent construction management or field modifications to plans and specifications. For others, it is simply inherent construction management or field modifications. What determines the extent of exposure is the type of contract and project delivery method under which the contractor is engaged and the services they are contracted to perform. This professional liability risk profile describes the Construction Manager - At Risk (CMAR) project delivery method and presents potential professional risks associated with this delivery method.

DEFINING CHARACTERISTICS

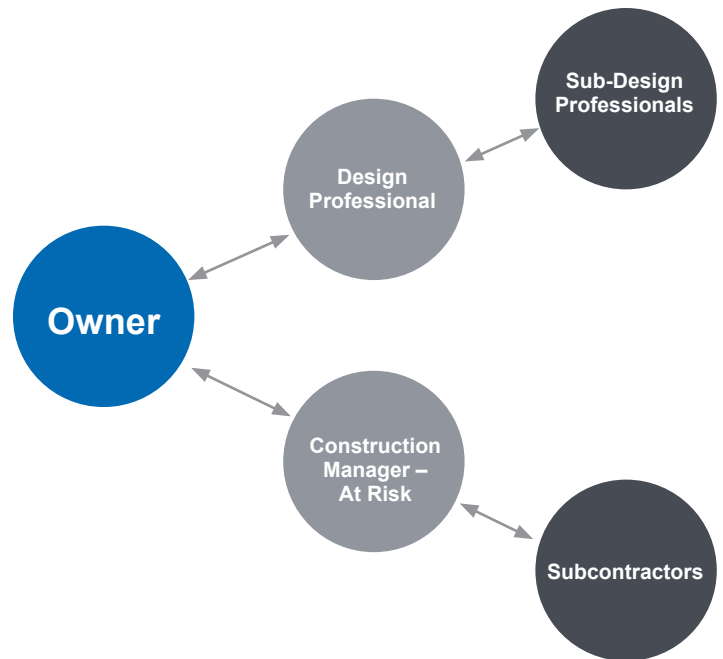
In the CMAR project delivery method, the Owner holds two contracts. One contract is with the Design Professional (DP) and the second is with the CMAR, who then holds contracts with the subcontractors and is responsible for the performance of the construction work and typically under a guaranteed maximum price.

The CMAR provides pre-construction services such as consultation to the Owner during the design phase. Once construction begins, the CMAR acts as a General Contractor, building the project with either its own crews or subcontracted trades.

Many insurance professionals confuse the main difference between a Construction Management Agency (CMA) and a CMAR. The difference is that the CMA manages the project on behalf of an owner and does not guarantee cost or schedule. CMA is NOT a project delivery method, rather it is a project management performance on behalf of an owner.

The CMAR is one method for delivering the project to the owner, while also sharing the risk of meeting the cost and schedule with the Owner. The CMAR oversees the management of the project, while also acting as a GC, who builds the project.

The main benefit to the owner for the CMAR project delivery method is fast-tracking projects. Construction can begin before design plans and specifications are completed, which shortens the project delivery schedule and allows the owner to generate revenue for their asset (project) sooner.



POTENTIAL PROFESSIONAL LIABILITY EXPOSURES

SPECIFICATIONS

Performance based specifications focus on outcomes or results rather than construction process. Conversely, designer prescriptive specifications detail and outline exactly how the CMAR (or specialty subcontractors) must construct a project. The CMAR can draw from past performance specifications experience and past

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construction performance to aggressively build projects. However, the CMAR also oversees all project work and must ensure that agreed upon performance and construction specifications are followed and projects are completed / delivered within budget and schedule. Projects delivered to owners over budget or beyond scheduled delivery date can result in economic damages against the CMAR by the owner.

FIELD MODIFICATIONS

Changes to the plans, design or construction specifications during construction (i.e., field modifications) must be approved by the CMAR. Approval of field changes are professional decisions (or can require the use of subcontracted design consultants) and can result in errors or construction failures, exposing the CMAR to a professional risk. Field modifications are a significant professional liability exposure for a CMAR.

CONSTRUCTION MEANS & METHODS

Construction means and methods are procedures and techniques employed by contractors to assist in the construction of the permanent project or structure. They can be considered anything NOT remaining permanently with the final structure or project. Examples may include: construction cranes or tower cranes, temporary construction elevators, forms systems, scaffolding, safety rails and netting, temporary footings or supports, etc. Engineers (on staff or subcontracted) many times are contracted to perform services within the realm of construction means and methods. In addition, there typically is some latitude in design and product / method substitution.

BUILDING INFORMATION MODELING

The automated use of Building Information Modeling (BIM) came about in the late 1980s. It can be used by the CMAR to assess the phasing and sequencing of construction. Any economic damages to an Owner caused by project delay resulting from erroneous use of BIM to manage construction could expose construction entities to professional risk and therefore exposes the CMAR to professional risk.

CONSTRUCTION MANAGEMENT

Every CMAR performs construction management in addition to construction (or subcontracting with trades). Depending on the contract, construction management activities can include:

- Hiring adequate and qualified subcontractors
- Managing subcontractors
- Managing repairing and inspecting subcontractors' work (e.g., oversight of concrete work, including reinforcing steel spacing, form spacing, etc.)
- Providing proper direction to crews and subcontractors
- Managing schedules / sequencing of phased construction
- Managing Project Budgets
- Checking and approving shop drawing for field modifications during construction

In addition, faulty workmanship or flawed work performed during construction or installation of components of a structure may ultimately result in professional liability. Faulty workmanship can show up as a leaky roof, buckling or cracking walls, collapses or settlement issues, or problems with wiring or plumbing. While the faulty work itself should not expose the GC to professional liability, the allegations can be made of negligence in the management of subcontractors and the failure to detect such faulty work.

SPECIALTY SUBCONTRACTORS

Often, the vicarious design liability inherent in lower-tier contracts with subcontractors goes unnoticed. For example, a mechanical / electrical / plumbing (MEP) contractor may perform some of the design, as well as the installation. In this case, the design-builder or GC holds a contract for both design and construction / installation, and assumes the liability of any negligent acts as a result of the MEP's services. This can occur for contracts related to curtain walls, glazing, exterior insulation finishing systems (EIFS), fire suppression systems, retaining walls, alarm systems, landscaping, etc. So, the key to uncovering design liability is to identify not only the design professional under a contract, but also those subcontracts that may contain an element of design.